IN THE

Supreme Court of the United States

.....TERM, 1947

No. 177

AVERY B. CHERETON,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Avery B. Chereton, by his attorney, respectfully prays for the issuance of a Writ of Certiorari to review the judgments of the United States Circuit Court of Appeals for the Sixth Circuit, affirming, on June 5, 1947, the judgment of the United States District Court for the Eastern District of Michigan, Southern Division and in denying on June 5, 1947, Petitioner's request for rehearing.

SUMMARY STATEMENT OF THE CASE

Section 1

Petitioner was informed against by an amended information (filed March 1, 1946) charging that petitioner, on June 15, 1945, at Detroit, Michigan, did wilfully unlawfully and knowingly have 148 gasoline ration coupons illegally in his possession, contrary to the provisions of Subparagraphs B, C & E of Sec. 1394.8177 of ration order No. 5C as amended (Appendix A to the Brief in Support hereof) issued by the Price Administrator of the Office of Price Administration, pursuant to authority vested in him by the applicable provisions of Title III of the Second War Powers Act (Appen. B to the Brief in Support hereof) and upon his plea of not guilty was tried in the United States District Court at Detroit, Michigan March 1, 5, 6 and 7, 1946 by a jury before the Honorable Ernest A. O'Brien, District Judge for the Eastern District of Michigan.

Section 5 of Title III of the Second War Powers Act, the penal section of said Act provides that all violations of the Act are misdemeanors.

The Government's case against petitioner rested on the testimony of four witnesses, three of whom were present at the arrest of petitioner on June 15, 1945; petitioner's arrest having been made by a Detroit, Michigan plain clothes police officer, without warrant, acting at the request of and accompanied by an investigator of the Office of Price Administration and an informer for said Office of Price Administration.

The Government's witnesses testified at the trial that defendant had illegally in his possession at the time of his arrest, 148 gasoline ration coupons. None of said coupons were introduced into evidence at the trial, it having

been there testified that the same had been lost or mislaid prior to the trial.

Petitioner did not take the stand at his trial, but competent and uncontroverted testimony adduced thereat on his behalf tended to prove that petitioner had legal possession of the said 148 gasoline ration coupons taken from his possession at the time of his arrest and that as a consequence his admitted possession of these coupons on June 15, 1945 did not constitute a *wilful* violation of the penal section of the statute in question, to-wit, Section 5 of Title III of the said Second War Powers Act.

Section 2

The Trial Court's charge to the jury (Appendix C to the Brief in Support hereof) contained no exposition or delineation of the essential elements of the offense charged against petitioner nor did said charge contain any reference whatsoever to the statute upon which petitioner's prosecution was based or instruction that to convict the jury must find the element of "wilfulness" present.

The charge did contain certain paragraphs of the rationing order or regulation allegedly violated by petitioner. Counsel for Petitioner objected to the Trial Court reading these provisions of the rationing regulation to the jury as a part of his charge (Record p. 114) but did not make any affirmative demand that a charge include a reference to the basic statute involved.

Whereas the language of the ration order in question provides against *any violation of its terms* whether the violation be wilful or not, Section 5 of Title III of the Second War Powers Act (see Append. B. to brief in support hereof) by express language limits the imposition of criminal penalties for violation of the statute to "any person who *wilfully* performs any act prohibited" by the statute or any rule or regulation promulgated thereunder.

Section 3

During the progress of petitioner's trial, the hereinafter set forth newspaper story appeared in the Detroit Free Press, one of the three principal Detroit dailies for Saturday, March 2, 1946, directly underneath the picture of the defendant. The defendant's name appeared directly beneath his picture and the article in question (under the principal caption "GAS COUPON EVIDENCE MISSING; TRIAL DELAYED" and the sub-caption, "PASSION GUM") read:

> "The trial of Avery B. Chereton, who once got in trouble with Uncle Sam for selling 'Passion Gum,' was adjourned until Tuesday by Federal Judge Ernest A. O'Brien when gas coupons to be used as a Government exhibit were found missing.
>
> "Chereton is charged with illegally obtaining 740 gallons of gas for a yacht cruise.
>
> "Frank X. Norris, assistant United States Attorney, told the Court the coupons had disappeared from the OPA office since Chereton's arrest in July, 1945.
>
> "Judge O'Brien took under advisement a motion for a directed verdict of acquittal made by William Fitzpatrick, Chereton's attorney.
>
> "Chereton who is president of the Home Equipment Co., is also under Federal injunction for failure to obtain one-third down payments in his house-to-house sales of electrical equipment.
>
> "He was once fined $1,000.00 by the Federal Government for using the mails to defraud. He was convicted of advertising 'passion-provoking' chewing gum for sale at $1.00 a package" (R. 33).

Articles of similar purport had appeared in the other two principal Detroit daily newspapers published March 2, 1946, and during the progress of the trial herein.

At the first session of the trial following this occurence, petitioner's counsel read the said newspaper article into evidence and moved for a mistrial (Record p. 67).

The Court thereupon examined the jury on the matter and it appeared that at least one member of the jury admitted reading the newspaper article in question and further that several other members of the jury read articles of similar purport that appeared during the course of the trial in other Detroit daily newspapers. All such articles contained comments on defendant's prior conviction for a Federal offense, although only the Detroit Free Press article above set forth carried a picture of petitioner (Record p. 80).

The Court denied Petitioner's motion for mis-trial in the presence of the jury (Record p. 82).

Section 4

During closing argument, the assistant United States District Attorney prosecuting petitioner made the following quoted statement to the jury:

> "I will ask you, members of the jury, to take this case from the evidence you have heard from the witness stand, and that is all. We are satisfied, the government is satisfied to submit this case to you under the evidence that you heard from the mouths of the Government witnesses. I have told you before, members of the jury, and it bears repeating, how is their testimony controverted? These witnesses for the defendant, do they tell you one thing, *does any witness for the defendant in this case tell you that one of the 148 coupons was lawfully in the possession of Mr. Chereton? No, no.* They tell you,

and put people on the stand here, that because of the fact they were getting coupons from the ODT and there was this business of shuffling them around in Chicago, and sending them through the mail, you are supposed to infer from that, that maybe those were legal, and *has anyone the temerity to get on the stand* and tell you a very simple statement, a very simple statement to the effect these 148 coupons are legal, and Mr. Chereton had a right to them. * * *" (Rec. 137 and 138).

"* * * So when you come right down to any analysis, to analyze this evidence, members of the jury, you have the testimony of these Government officers, absolutely uncontroverted, uncontradicted, standing without contraction. * * *." (Italics ours.)

No one other than three Government witnesses and the defendant were present at the time of defendant's arrest when the 148 gasoline coupons were taken from defendant's possession and the Government had misplaced or lost the gasoline ration coupons in question prior to trial.

There was no possible defense witness, other than defendant, who could have testified to the actual condition of the gasoline ration coupons when the same were taken from defendant and therefore we submit that the above quoted remarks of the prosecutor could have no meaning to or effect upon the jury, other than serving as a reminder to them that the defendant had failed to take the stand and deny the allegations of the Government. It being plain that, in point of fact, defendant alone could have disputed the Government's testimony.

Petitioner's counsel objected to the above quoted remarks of the prosecutor (Record p. 138). The trial court did charge the jury (Record p. 108) that it was to draw no unfavorable inference from the fact that the petitioner did not take the stand in his own defense.

Section 5

Defendant was arrested June 15, 1945 by Detroit police officer, Thomas Patterson, at a gasoline filling station located in the City of Detroit. Patterson had no warrant for the arrest or search of defendant.

Officer Patterson testified at the trial (on the question of defendant's arrest and search) that he had been assigned by his Lieutenant to accompany OPA Investigator Deneen to the gas station where he subsequently arrested defendant (R. 54), that he had been advised by Deneen and the witness George of what had taken place between defendant and George on June 14, 1945 (Record 60). As to exactly what took place, and what was observed by him (Patterson) immediately prior to the arrest, we see that Patterson testified as follows on direct examination:

> "On June 15, 1945 I was detailed to accompany Mr. William Deneen on an investigation. Mr. Deneen came to the office, and I accompanied him to a gasoline station located on the northeast corner of West Hancock and Cass. * * * He (the witness George) again went to Mr. Chereton's office, and we saw them as they came into view of the gas station. I walked into the ladies' restroom right off the office and stood behind the door there. Mr. Deneen waited in the office, a couple of feet away from the door."

> "Mr. Chereton and Mr. George came in the door. For a period of about two minutes they were in there. There is a mirror on the north wall of that restroom, and with the door ajar, that gave me, looking into the mirror, a clear view of the office. *When I saw Mr. Chereton reach in his pocket, and pull out an envelope, I stepped out into the outer office, removed the envelope from his hand, identified myself, and told him he was under arrest.* * * *" (Record 54). (Italics ours.)

Section 6

Petitioner was convicted as charged on March 7, 1946 and on June 14, 1946 was sentenced to imprisonment for a period of one year and to pay a fine in the amount of $1,000.00 (Record p. 5).

An appeal was taken (Record p. 6) and petitioner claimed reversible error (Record 143, 144 and 145) on the part of the Trial Court in the following particulars:

1. By failing to instruct the jury as to the specific statute allegedly violated by the defendant and by not including instructions as to the essential elements and ingredients of the offense charged.

2. By failing to grant Petitioner a mis-trial because of the claimed improperly prejudicial reference in argument to the failure of the defendant to testify.

3. By failing to declare a mis-trial because information highly prejudicial to the petitioner came to the attention of the jury through a newspaper article which appeared during the course of petitioner's trial and was admittedly read by one or more members of the jury.

4. By failing to grant petitioner's motion to supress all evidence relating to defendant's possession of certain gasoline ration coupons at the time of his arrest on June 15, 1945.

Briefs were filed and argument on appeal heard by the Circuit Court of Appeals on March 31, 1947 at which time, Petitioner urged all errors hereinabove immediately specified together with other claimed errors as set forth in his Assignments of Error and in his Brief (Record p. 149).

On April 10, 1947, the Circuit Court of Appeals entered its judgment affirming the judgment of the lower Court

(Record p. 149) and an opinion in support of this judgment (Record p. 150).

As pointed out in petitioner's request for re-hearing, filed April 28, 1947 (Record p. 151-154) the said April 10, 1947 judgment of the Circuit Court of Appeals contained manifest and plain error in law and fact, all in specific detail as claimed in paragraphs A, B, C, D, E and F, of petitioner's said Request for Rehearing (Rec. pps. 152, 153 and 154).

On May 12, 1947, the Circuit Court of Appeals entered an Order vacating its judgment of April 10, 1947 and granted petitioner 10 days within which to file additional Brief (Record 155).

Petitioner filed a Brief on Rehearing within the 10 day period limited and on June 5, 1947, the Circuit Court of Appeals filed its judgment affirming the judgment of the lower Court (Record p. 155) and filed its *per curium* opinion the same date (Record 155 and 156).

On June 6, 1947 the Circuit Court of Appeals entered its order denying petitioner's request for rehearing (Record p. 150).

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

1. The conviction and sentence of petitioner constitutes a deprivation of his liberty and confiscation of his property without due process of law as guaranteed to him by the Constitution of the United States.

2. The judgment of the United States Circuit Court of Appeals for the Sixth Circuit affirming the judgment of the District Court constitutes a decision in conflict with the decisions of other Circuit Courts of Appeal on

the same matter; constitutes a decision on several important questions of general law that is probably untenable and in conflict with the weight of authority; constitutes a decision on several Federal questions of law in conflict with the applicable and controlling decisions of this Court.

3. The several questions involved are of general importance relating to the construction of a statute of the United States, to-wit, Title III of 2nd War Powers Act.

QUESTIONS PRESENTED

1. Whether the due process of law guaranteed by the 5th amendment is denied where, as in the case at bar, the Court's charge to a jury in a criminal case contains neither a reference to or designation of the statute allegedly violated by the petitioner and/or an exposition or delineation of the essential ingredients of the offense charged.

2. Whether the due process of law guaranteed by the 5th Amendment is denied where, as in the case at bar, the argument of an assistant United States Attorney prosecuting a criminal case contains direct and indirect reference to the failure of the defendant to have taken the witness stand in his own behalf.

3. Whether the due process of law guaranteed by the 5th Amendment is denied where, as in the case at bar, the Trial Court, in a criminal case, fails, upon seasonable request therefore, to declare a mistrial because a newspaper article, admittedly highly prejudicial to the defendant, was read by one or more members of said defendant's trial jury during the progress of his trial.

4. Whether the due process of law guaranteed by the 5th amendment is denied where, as is claimed by Petitioner in the case at bar, the Trial Court in a criminal

case fails to grant a seasonable motion by defense counsel to suppress evidence obtained as the result of an illegal arrest for a misdemeanor, said arrest having been made without warrant and for a misdemeanor claimed not to have been committed in the presence of the arresting officer or to have constituted a breach of the peace, all in violation of petitioner's rights secured by the 4th Amendment.

STATEMENT OF BASIS OF JURISDICTION OF THIS COURT

Petitioner invokes the jurisdiction of this Court on the denial of due process of law (guaranteed to petitioner by the 5th amendment and on the denial of the right to be secure in his person, papers and effects against unreasonable searches and seizures (guaranteed to petitioner by the 4th amendment) as a result of the decision of the United States Circuit Court of Appeals for the Sixth Circuit, in the case at bar, affirming the erroneous judgment of conviction and sentence of the District Court for The Eastern District of Michigan and because justice to petitioner requires that this Court exercise its power of review and supervision. The jurisdiction of this Court is founded upon Sec. 347 (a) of Title 28 of the United States Code, as amended.

PRAYER

Wherefore, Petitioner, Avery B. Chereton, by his attorney, respectfully prays that a Writ of Certiorari issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court, a full and complete transcript of the Record and of the proceedings of said Court had in this cause, numbered and entitled on its Docket, Number 10, 287, Avery B. Chereton, Appellant v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court and that the judgment of the United States Circuit Court of Appeals for the Sixth Circuit be reversed and for such other and further relief as this Court may deem proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

SUBJECT INDEX AND TABLE OF CASES AND STATUTES CITED

(See first page of annexed Petition for Writ of Certiorari)

II.

OPINIONS BELOW

The opinions of the District Court of the United States for the Eastern District of Michigan, Southern Division (Record page 5) filed June 14, 1946, has not been reported.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (Record p. 155 and 156) filed June 5, 1947 and the said Court's Order denying Petition for Rehearing (Record p. 154) filed June 6, 1947 have not been reported.

III.

JURISDICTION

Jurisdiction of the Court is invoked under Sec. 347 (a) of Title 28 of the United States Code.

IV.

STATEMENT OF THE CASE

A summary of the case has heretofore herein been made in the annexed petition for Writ of Certiorari and appears therein under heading "Summary Statement of the Case" at pages 2 through 9 hereof, and the same is hereby, by reference incorporated in and made a part of this brief.

V.

QUESTIONS PRESENTED

The questions herein in this Brief discussed and presented are contained and set forth at page 10 and 11 of the annexed Petition for Writ of Certiorari and the same are hereby by reference incorporated herein and made a part of this brief.

VI.

CONSTITUTIONAL PROVISIONS INVOLVED

The 5th Amendment to the United States Constitution, provides in part:

> "* * * No person shall * * * be deprived of life, liberty or property without due process of law; * * *"

and the 4th Amendment to the Constitution of the United States provides in part:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, * * *."

VII.

SUMMARY OF ARGUMENT

1. Petitioner contends that the judgment herein of the United States Circuit Court of Appeals for the Sixth Circuit (Record p. 155 and 156) holding in substance that it was not, in the absence of a specific request, necessary for the Trial Court to have charged the jury in the words or substance of the statute allegedly violated and to have charged on the elements and ingredients of the offense charged is indubitably in conflict with recent and applicable decisions of this Court and of the applicable decisions of other U. S. Circuit Courts of Appeal and violates rights secured to petitioner by the 5th Amendment.

2. Petitioner contends that the herein judgment of the United States Circuit Court of Appeals for the Sixth Circuit (Record p. 155 and 156) holding no reversible error involved in the remarks in argument to a jury by a United States Attorney, in a criminal case, (all as set forth in detail at pages 5 and 6 of the annexed Petition for Writ of Certiorari) constituting a direct and an indirect reference to the failure of the defendant to take the stand is in conflict with applicable decisions of this Court and the applicable decisions of other Circuit Courts of Appeal and violate petitioner's rights as secured by the 5th Amendment.

3. Petitioner contends that the judgment of the United States Circuit Court of Appeals for the Sixth Circuit (Record p. 155 and 156) holding in substance that it was not error for a trial Court in a criminal case to refuse to declare a mistrial, upon seasonable motion, when it appeared that one or more members of the jury read, during the course of the trial, a newspaper article, highly prejudicial to the defendant, is in conflict with the applic-

able decisions of this Court as well as in conflict with the applicable decisions of other Circuit Courts of Appeal, and constitutes a violation of the petitioner's rights as guaranteed by the 5th Amendment to the Constitution of the United States.

4. Petitioner contends that the judgment of the United States Circuit Court of Appeals for the Sixth Circuit (Record p. 155 and 156) holding in substance that the refusal of a trial court in a criminal case to suppress, on seasonable motion therefore, evidence obtained as a result of an arrest claimed to have been illegal because made, without warrant, for a misdemeanor not committed in the presence of arresting officer and not constituting a breach of the peace is in conflict with the applicable decisions of this Court and with those other Circuit Courts of Appeal and constitutes a violation of petitioner's rights as guaranteed by both the 4th and 5th amendments.

VIII.
ARGUMENT

SECTION A

Petitioner, as appellant, urged as his main point on appeal to the Circuit Court of Appeals herein that the charge of the Trial Court was fatally erroneous in that it contained no exposition of the essential elements of the offense charged against the defendant nor any reference whatsoever to the statute upon which his conviction was based and particularly because the trial court's charge did not contain an admonition that the jury must find, in order to convict, that the defendant's possession of the gasoline ration coupons taken from him at the time of his arrest was of a *wilful* nature and *wilfully* in violation of the statute and rationing regulation involved.

Petitioner was brought to trial on an information charging, in substance, that on June 15, 1945, he unlawfully had 148 gasoline ration coupons in his possession in violation of certain specified provisions of Ration Order 5-C, as amended (Appen. A. hereto), issued by the Administrator of the Office of Price Administration, pursuant to authority in him vested by operation of the provisions of Title III of the Second War Powers Act, as amended (Appen. B hereto).

It must be conceded that the only legal basis for the criminal prosecution of defendant in a Federal jurisdiction is that by contravening certain sections of Ration Order number b-C, as amended (See Appen. A hereto) he violated Title III of the Second War Powers Act, as amended (Appen. B. hereto) and thereby subjugated himself to operation of the penal provisions of that statute as contained in paragraph 5 thereof, the same reading:

"(5) Any person who wilfully performs any act prohibited, or wilfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall upon conviction, be fined not more than $10,000.00 or imprisoned for not more than one year, or both."

Whereas the language of the ration order in question provides against any violation of its terms, whether the same be *wilful* or not, the statute (Sec. 5 of Title III of the Second War Powers Act) expressly limits the imposition of criminal penalties to "any person who *wilfully* performs any act prohibited" by the statute or by any rule or regulation promulgated thereunder (Italics ours).

There can be no doubt but that the Congress specifically provided that the element of "wilfulness" must be present in order to permit of a criminal prosecution for violation of the statute and/or rules and regulations promulgated thereunder. Therefore it follows that the conviction of the defendant in the case at bar could not be sustained unless it were affirmatively demonstrated that the element of "wilfulness" was present and that the jury was instructed accordingly.

The trial court in his charge to the jury failed entirely to instruct the jury that they must, in order to return a verdict of guilty, find that the defendant *wilfully* violated the basic statute and the provisions of the ration order promulgated thereunder. In fact the charge failed to mention the statute.

The only *approximation* of a charge on the matter of the elements and ingredients of the crime charged is to be found in the following language of the trial courts charge:

"Members of the Jury, the charge in the information against the defendant at bar is that on the fifteenth day of June, 1945, he had in his possession illegally gas coupons. Now, that is the gist and the substance of the charge. * * *" (Record 108.)

"* * * Now, as I said, the gist of this case is the charge that the defendant, on the day indicated, had in his possession illegal gasoline stamps. It is the obligation of the government to establish that in your minds beyond a reasonable doubt. * * *" (Record 110.)

"* * * If so, that is the charge, illegal possession, and in order that you may know just what the law is in connection with that, I am going to read it to you now in detail, so here are the effective paragraphs that are the substance of the charge in the case before you."

"I have told you the gist of the crime is the illegal possession, so you are not to concern yourselves in any degree with what this defendant may or may not have intended to do with those coupons, whether he may have intended to put them to an illegal use or not does not concern you, but solely the question of the illegal possession" (R. 115).

Nowhere in the charge contained is to be found an admonition that the jury must not only find that the defendant's possession of gasoline ration stamps on June 15, 1945 was contrary to the language of the ration order but that in addition, the jury must find that the illegal act complained of was in fact wilfully performed by defendant in violation of the penal clause of Title III of the Second War Powers Act.

The fact is that the trial court failed even to mention or designate the federal statute involved, but on the contrary (See R. 114, 115), read "as the law" certain provisions of Ration Order 5-C to the jury (which provisions

nowhere specify the presence of "wilfulness" as an element prerequisite to a criminal violation) after making the following prefatory remarks:

> "• • • That is the charge, illegal possession and in order that you may know just what *the law is* in connection with that I am going to read it to you now in detail, so here are the effective paragraphs that are the substance of the charge in the case before you" (R. 114). (Italics ours.)

It is conceded by defendant that his counsel made no request to charge on the necessity of the jury finding the presence of the element of "wilfulness." However, we respectfully contend, that, as here, the failure of the trial court to instruct the jury on the question of the essential ingredients of the offense charged is so fundamental an error as to require an appellate court to note the error, *sua sponte*.

In support of this argument, see the following cases, most of them but recently decided: *Screws v. United States*, 325 U. S. 91, 89 L. Ed. 1495; *United States v. Noble*, 155 F. (2) 315; *Levy v. United States*, 153 Fed. (2) 995; *Williams v. United States*, 131 Fed. (2) 21.

This Court in the recent case of *Screws v. United States*, 325 U. S. 91, 89 L. Ed. 1495, held that the terms "wilful" and "wilfully" when used in a penal statute connote and mean "something more • • • than the doing of the act proscribed by the statute • • •," and the Court there held that where the term "wilfully" is utilized that

> "an evil motive to accomplish that which the statute condemns becomes a constitutent element of the crime • • • *and that issue* must be submitted to the jury under appropriate instructions." (Emphasis added.)

and that the trial court's instructions were fatally deficient and constituted grounds for reversal because those instructions did not advise the jury of the factors or elements making up the crime charged.

By way of answer to the contention that Petitioner can not for the first time on appeal raise the question having failed to to take an exception to the charge of the court or to request the charge here contended for as being necessary—this Court stated in the majority opinion in the Screws case (at bottom page 1505 and top of page 1506 of Vol. 89, L. Ed):

> "It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. See *Johnson v. United States,* 318 U. S. 189, 200, 87 L. ed. 704, 713, 63 S. Ct. 549. *But there are exceptions to that rule. United States v. Atkinson,* 297 U. S. 157, 160, 80 L. ed. 555, 557, 56 S. Ct. 391; *Clyatt v. United States,* 197 U. S. 207, 221, 222, 49 L. ed. 726, 731, 732, 25 S. Ct. 429. And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. *Whatever the degree of guilt, those charged with a Federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."* (Emphasis added.)

This Court in the Screws case, was considering and construing Sec. 20 of the Federal Criminal Code *18 U. S. C. A.* 52, 7 F. C. A. Title 18, Sec. 52 which reads as follows:

> "Whoever under color of any law, statute, ordinance, regulation, or custom, *willfully* subjects, or causes to be subjected, any inhabitant of any State, Territory or District to the deprivation of any

> rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000.00 or imprisoned not more than one year, or both." (Emphasis added.)

and in arriving at its conclusion that the word "wilfully" in said section connotes and means something more than the doing of the mere act proscribed by the statute pointed out that the term "wilfully" was added to the section by the Congress by way of amendment, for the purpose of making the section "less severe" page 103 of Vol. 326 of U. S. Reports).

In view therefore of this reasoning it is quite obvious that the decision in the Screws case squarely supports Petitioner's position to the effect that the term "wilfully" as utilized in Sec. 5 of Title III of the Second War Powers Act connotes and means that the Congress intended that the criminal penalties should only be imposed in cases where the regulations promulgated under the said act were violated in an intentional, deliberate and knowing manner and that therefore the failure of the trial court in the instant case to charge the jury that to convict, they must find that the violation of the rationing regulations imputed to the petitioner was "wilful" constituted error.

We most strenuously and seriously urge that the Court here is not concerned with any "mere remote chance of prejudice" but rather with a concrete and factual situation involving a deprivation of the petitioner's constitutional right to have the jury fully instructed as to the essential ingredients and elements ("wilfulness" necessarily included) of the offense with which he was charged.

The defense put forth at the trial of this cause by the petitioner (prejudiced as he was by reason of the fact that the gasoline ration coupons in question were missing from and not available at the trial) was that he had come into possession of the gasoline ration coupons (taken from him at the time of his arrest) in a proper manner and in fact as an agent or go-between for employees of his company and the Office of Price Administration. If mere possession of these coupons was made illegal and unlawful by the language of the rationing regulation (which contained no requirement that the element of "wilfulness" be present) that was not the fact with reference to the penal section of the statute which definitely provided that criminal prosecutions could not be invoked except in those cases wherein the violation of the regulation was of a "wilful" nature.

In a word—the question of "wilfulness" was a prime, if not the sole question for the jury in the instant case and the jury needs must have been instructed thereon in order to convict.

We find here a situation where the jury was *not* instructed that they must find that the appellant's possession was wilfully contrary to the provisions of the rationing regulation *but on the contrary were told by the trial court that the said rationing regulation* (which contained no mention of the necessity of the presence of the element of "wilfulness") *was "the law"* (Record 114).

The jury in the instant case could well have found—and we submit that in all probability it did find—that appellant violated the ration regulation without finding that he "wilfully" violated it or the underlying penal statute, which statute was never mentioned or described, nor its essential elements catalogued, in the trial court's charge to the jury.

Further in support of our position, we respectfully direct this Court's attention to the fact that the Third Circuit Court of Appeals (in the cases of *United States v. Noble,* 155 Fed. (2) 315 and *Levy v. United States,* 153 Fed. (2) 995) as well as the Ninth Circuit Court of Appeals (in the case of *Morris v. United States,* 156 Fed. (2) 525) both recently held that a failure such as in the instant case of the trial Court to instruct the jury as to the essential elements of the crime charged was reversible error even though the appellant concerned had not objected to the deficient charge nor filed a seasonable request for a proper charge.

Conclusion

We respectfully submit that the failure of the trial court to mention or describe the statute allegedly violated by defendant and to catalogue and define the essential element and ingredients of the offense charged to him constituted a denial of petitioner's rights as secured by the 5th Amendment; that the reference by the trial court in his charge to certain "illegal" acts was not tantamount or equivalent to an instruction, on the essential element of "wilfulness" and that the failure of the petitioner to except to the charge as given or to request a proper charge was not, under the circumstances, such an omission as would preclude this Court from holding the charge erroneous.

SECTION B

During his closing argument, the assistant United States attorney made certain remarks (set forth in full at pages 5 and 6 of the annexed Petition for Certiorari) claimed by Petitioner to be improper, unfair, highly prejudicial and calculated to direct the attention of the jury to his failure to testify on his own behalf.

It is to be remembered that no one other than three Government witnesses and the petitioner were present at the time of his arrest when the 148 gasoline coupons were taken from petitioner's possession and further that the Government had misplaced or lost the gasoline ration coupons in question prior to trial.

In view of the factual situation immediately above described there was no possible defense witness, other than petitioner, who could have testified to the actual condition of the gasoline ration coupons when the same were taken from him and therefore we submit that the above quoted remarks of the prosecutor could have no meaning or effect upon the jury, other than serving as a reminder to them that the petitioner had failed to take the stand and deny the allegations of the Government. It being plain that, in point of fact, petitioner alone could have disputed the Government's testimony.

Indeed, the challenge contained in the question,

> "* * * has anyone the temerity to get on the stand and tell you a very simple statement, a very simple statement to the effect that these 148 coupons are legal * * *" (R. 138).

was direct reference to the petitioner's failure to take the stand, whereas the balance of the language quoted at page 6 hereof constituted an indirect reference thereto.

The highly provocative phrase,

> "• • • and has anyone the temerity to get on the stand • • •"

immediately following, as it did, the prosecutor's analysis of the testimony of all defense witnesses, can not be considered as merely repetitive and by way of oratorical emphasis of what had been previously said but it was on the contrary, the direct statement of an entirely separate, though related, concept. The words "anyone" and "temerity" when considered in the context in which they were used have no significance other than the obviously sinister implications we ascribe to them.

In view of the provisions of Sec. 632 of Title 28 U. S. C. A. (Appen. D hereto) the law is well settled that it is reversible error for a District Attorney, in his argument in a criminal case, to comment either directly or indirectly upon the failure of the defendant to be a witness on his own behalf. The statute provides that defendant may be a witness and that his failure so to be shall not create a presumption against him. See *Wilson v. United States,* 149 U. S. 60, 37 L. Ed. 650; *United States v. Sprengel,* 103 Fed. (2) 876; *Grantillo v. United States* 3 Fed. (2) 117; *Tingel v. United States,* 38 Fed. (2) 573; *Barnes v. United States,* 8 Fed. (2) 832.

The particular attention of the Court is respectfully directed to the case of *Barnes v. United States, supra,* wherein the prosecutor stated in argument (see page 834 of Vol. 8 Fed. 2nd):

> "• • • The witness Pryor took the stand and testified he bought dope from these defendants, and not a human being has testified that in so testifying, Pryor lied." (Pryor was a government witness.)

The Circuit Court of Appeals there stated (at pages 834 and 835 of Vol. 8, Fed. 2nd):

> "* * * It must be noted that the sale of opium took place in the night when no one but the defendant, Bowers, and the Government witness, Pryor, were present. There were no other, besides the defendant who could have contradicted the testimony of Pryor to the sale and pronounced it false. Of course, the sale itself constituted the gist of the offense and in our judgment there was ample testimony to clearly establish the guilt of the defendant. Nevertheless, the protection of defendant against comments of this nature is expressly protected by statute and jealously preserved by the courts. * * *." "*Wilson v. United States,* 149 U. S. 70, 37 L. Ed. 650; *Linden v. United States,* 26 Fed. 104; *Reagon v. United States,* 157 U. S. 301, 39 L. Ed. 709; *Stout v. United States,* 227 Fed. 700; *Shea v. United States,* 251 Fed. 440; *Robilio v. United States,* 250 Fed. 101; *Nobile v. United States,* 284 Fed. 253." "Reversed."

We submit that the facts in the case at bar are on all fours with the facts both in the Barnes and Linden cases *(supra)* and the rule therein established should be applied to the case at bar.

In our case, the petitioner alone could have supplied the information called for in the remarks in the closing argument of the prosecutor because he was alone with the three government witnesses when arrested and since he alone could contradict the testimony of the Government's witnesses, the comments of the prosecutor, involving as they did the very gist of the offense charged, could not but operate prejudicially against the petitioner.

For the prosecutor to ask why no defense witness testified that the 148 gasoline stamps were legally in petitioner's possession was for him to ask why the petitioner did not so testify.

Furthermore, it would appear that these remarks were objectionable and erroneous when considered in the light of the well established rule preventing a district attorney from commenting, in argument, on the failure of the defense to produce or use evidence or witnesses when in fact the evidence or witnesses called for would be incompetent and the testimony inadmissible. See *Hamburg American Steam Packet Co. v. United States,* 250 Fed. 747; *Hall v. United States* 256 Fed. 748 and *United States v. Laudani,* 134 Fed. (2) 847.

Counsel concedes that he did not assign a proper reason for his objection to the remarks of the prosecutor (R. 138) although he did object and further that the Trial Court did charge the jury (R. 108) in substance that they were to draw no inference unfavorable to the defendant from the fact that he did not testify.

However we urge for the reasons hereinabove assigned, that the prosecutor's remarks concerning the failure of the defendant to take the stand were so palpably improper and highly prejudicial as to bring the situation within the exception to the rule (requiring particularized objection) as laid down in the case of *DeMayo v. United States,* 32 Fed. (2) 472. There the appellate court stated that reference by the prosecutor to the failure of the defendant to testify on his own behalf was

> "* * * reversible error unless the court sharply, emphatically and promptly advises the jury that the matter is improper and that they should give no consideration thereto. This should be done in unmistakable and positive terms. To that extent, at least, if not to a greater extent, counsel should be rebuked. This is one of the most damaging acts on the part of a prosecutor that can be committed in the course of a trial, not only from the standpoint of the defendant, but because of its effect upon the

> case generally, and should not be condoned. * * * we can not forbear calling attention to the serious damage which may accrue to the administration of the criminal laws if counsel permit their zeal thus to obscure their judgment in the heat of trial. * * *" (Page 475.)

We submit that the technical failure of counsel to adequately protect his record by recording particularized objection is of no moment in the instant case because the error involved was so damaging to the constitutional rights of the defendant as to require this court to intervene on its own instance. The rule here contended for by defendant is stated in the case of *Van Gorder v. United States,* 21 Fed. (2) 939 as follows:

> "* * * In criminal cases involving the life or liberty of the accused, the appellate Court of the United States may notice and correct in the interests of a just and fair enforcement of the laws, serious errors in the trial of the accused fatal to the defendant's rights, although those errors were not challenged or reserved by objections, motions, exceptions, or assignments of error. * * *" "*Crawford v. United States,* 212 U. S. 183, 53 L. Ed. 465; *Weems v. United States,* 217 U. S. 349, 54 L. Ed. 793; *Lamento . United States,* 4 Fed. (2) 901 and cases cited" (Page 942).

Conclusion

For the reasons hereinabove stated, the remarks in argument of the assistant United States attorney herein questioned, operated to deprive petitioner of rights secured to him by the fifth amendment of the Constitution of the United States.

SECTION C

At this point in his Brief, Petitioner alleges that the newspaper article (quoted in full at pages 4 and 5 of the annexed Petition for Writ of Certiorari) operated to prejudice the jury against petitioner and precluded him from receiving a fair and impartial trial in violation of rights secured to him by the 5th amendment to the constitution of the United States.

It appeared that at least one member of the jury admitted seeing the above quoted article from the Detroit Fress Press and the defendant's picture therein (R. 80) and that several other members of the jury read articles about the case. All such articles contained comments on defendant's "prior conviction for a Federal offense" although only the above-quoted article from the Detroit Free Press carried a picture of defendant (Record p. 80).

The juror who admitted reading the Detroit Free Press article in question denied that she discussed the article with other members of the Jury (R. 82 and 83) but as stated by defense counsel on the Record (in the absence of the Jury, R. 78) defense counsel heard comment between two members of the Jury to the effect that one of them had seen "Mr. Chereton's picture in the paper Saturday." This statement of counsel was not challenged by the Government.

The Court denied the motion for a mis-trial in the presence of the Jury and in so doing stated (R. 82):

> "All right. I think the motion will be denied.
>
> "This jury isn't a new, inexperienced jury; they have been here since last November, and they have been instructed innumerable times of their absolute duty, in deciding cases from the evidence in court, and nothing else."

> "Counsel for the Government, counsel for the defendant, or the court itself, of course, has no control over what a newspaper may print; but the only thing we are interested in is that if that newspaper does print something concerning the case pending before any particular jury, is whether the jury has been affected detrimentally to the interests of the people in the case, to any degree. If it should happen that it was, of course, the duty of the court would be to dismiss you from further consideration of the case; but, as you have assured me that nothing you have read in any paper would in any way affect your ultimate judgment in this case, the motion will be denied."

At the conclusion of the trial, defense counsel again moved for a mis-trial on the same grounds and the Court again denied this motion (R. 106).

The newspaper story in question not only referred to defendant as a person "who once got in trouble with Uncle Sam for selling Passion Gum;" and was fined $1,000.00 when, "he was convicted of advertising passion provoking chewing gum for $1.00 a package" but likewise the said article identified defendant as being "under Federal injunction for failure to obtain one third down payment in his house to house sales of electrical equipment" (R. 77). Certainly the effect of that article (and of other similar articles in other principal Detroit daily newspapers admittedly read by members of the jury) was to improperly prejudice and poison the minds of the jury against defendant, and thereby preclude him from receiving a fair and impartial trial.

We submit that the trial Court's attempt to cure and remove this prejudice was necessarily ineffectual and that therefore the trial Court erred in failing to declare a mistrial, because it would not appear open to reasonable

doubt that the tendency of the newspaper article in the Detroit Free Press for March 2 was injurious to the defendant. See *Griffin v. United States,* 295 Fed. 437 and cases therein cited.

We submit that the fundamental rule involved and the rule that was violated in the case at bar is stated by the third Circuit Court of Appeals in the Griffin case, *supra,* in the following language:

> "It is the right of the defendant accused of a crime to have nothing reach the mind of the jury concerning the case except strictly legal evidence admitted according to law and if facts prejudicial to him reach the jury otherwise, it is the duty of the trial judge to withdraw a juror and grant a new trial. *U. S. v. Ogden,* 105 Fed. 371; *Mattox v. U. S.,* 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917; *McKibben v. Philadelphia and Reading R. R. Co.,* 251 Fed. 577" (page 439 of 295 Fed. Reports).

In the Mattox case (146 U. S. 140, 36 L. Ed. 918) this Court, in commenting upon the tenor of and effect on the defendant of statements contained in a newspaper article that improperly came to the jury's attention stated:

> "It is not open to reasonable doubt that the tendency of that article was injurious to the defendant. Statements that the defendant had been tried for his life once before; that the evidence against him was claimed to be very strong by those who had heard all the testimony; that the argument for the prosecution was such that the defendant's friend gave up all hope of any result but conviction; and that it was expected that the deliberations of the jury would not last an hour before they would return a verdict, could have no other tendency."

So far as concerns the situation in the case at bar, it is obvious that the Jury could not but have been preju-

diced against the defendant upon learning that he had previously been convicted for so reprehensible an offense as selling "Passion Gum" and of course it is equally obvious that the fact he was "under Federal injunction" at the time of the trial would certainly be prejudicial to him in so far as the mental attitude of the Jury was concerned.

Conclusion

The failure of the trial court to declare a mis-trial and the affirming judgment of the 6th Circuit Court of Appeals was a denial of rights secured to petitioner by the 5th amendment of the Constitution of the United States.

SECTION D

Petitioner urges that his arrest by Detroit City police officer Patterson, who held no warrant therefor, on June 15, 1945 was illegal and that as a consequence, all evidence relative to the said arrest and pertaining to papers and effects (including gasoline ration coupons) taken from his possession after said illegal arrest was inadmissible against him at the trial of the herein cause and constituted a violation of Petitioner's rights as guaranteed by the fourth and fifth amendments to the constitution of the United States.

Officer Patterson testified at the trial (on the question of defendant's arrest and search) that he had been assigned by his superior to accompany OPA Investigator Deneen to the gas station where he subsequently arrested defendant (R. 54), that he had been advised by Deneen and the witness George of what had taken place between defendant and George on June 14, 1945 (R. 60). As to exactly what took place at and what was observed by Pat-

terson immediately prior to the arrest, we see that Patterson testified as follows on direct examination:

> "On June 15, 1945 I was detailed to accompany Mr. William Deneen on an investigation. Mr. Deneen came to the office, and I accompanied him to a gasoline station located on the northeast corner of West Hancock and Cass. * * * He (the witness George) again went to Mr. Chereton's office, and we saw them as they came into view of the gas station. I walked into the ladies' restroom right off the office, and stood behind the door there. Mr. Deneen waited in the office, a couple of feet away from the door.
>
> "Mr. Chereton and Mr. George came in the door. For a period of about two minutes they were in there. There is a mirror on the north wall of that restroom, and with the door ajar, that gave me, looking into the mirror, a clear view of the office. When I saw Mr. Chereton reach in his pocket, and pull out an envelope, I stepped out into the outer office, removed the envelope from his hand, identified myself, and told him he was under arrest. * * *" (R. 54).

We contend that this testimony conclusively demonstrates that the arresting officer did not observe petitioner in the commission of a misdemeanor at the time he arrested him. All the arresting officer saw before he made the arrest was petitioner in possession of an envelope—certainly no visual evidence of any misdemeanor or other offense. Furthermore see testimony of defense witness Mallinson that it was physically impossible for Patterson to have observed that which he claimed he observed by looking into the washroom mirror (R. 84-85).

That law in point is plain and unequivocal. The fourth amendment to the constitution of the United States provides against unreasonable searches and seizures and it is

well established that papers and property obtained from a defendant in violation of his constitutional rights under the fourth amendment can not be used against him if application for suppression of said evidence is seasonably made. *Amos v. United States,* 255 U. S. 313, 65 L. Ed. 543.

This Court in the case of *Carrol v. U. S.,* 267 U. S. 132, 79 L. Ed. 543, stating the Federal rule on the question of when an arrest without a warrant may be made in cases of misdemeanors says (page 553 of Vol. 69 L. Ed):

> "* * * The usual rule is, a police officer may arrest without a warrant, one believed by the officer, upon reasonable cause, to have been guilty of a felony, and that he may only arrest without warrant one guilty of a misdemeanor if committed in his presence. *Kurtz v. Moffit,* 115 U. S. 487, 29 L. Ed. 458. The rule is sometimes expressed as follows:
>
> "'In cases of misdemeanor, a peace officer, like a private person has at common law, no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence.'"
>
> "The reason for arrest for misdemeanor without warrant at common law was promptly to suppress breaches of the peace, while the reason for arrest without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrest should be made at once without a warrant."

To review the facts is to sustain petitioner's contention that his arrest, sans warrant, for an alleged misdemeanor was illegal because the offense charged clearly did not constitute a breach of the peace and further because it

was not committed within the presence of the arresting officer.

Detective Patterson stated on direct that he stepped out from his place of concealment and arrested petitioner when he saw him reach in his pocket and pull out an envelope (R. 54). Thus, we see from Patterson's own testimony that he could not have seen any coupons in defendant's possession nor could he possibly have had "personal knowledge presently acquired" that the petitioner had not received the gasoline ration coupons (that he believed to be in the envelope in petitioner's hand) from the OPA either as principal or agent.

Such being the case, the arrest of the defendant was illegal and the following search unavailing insofar as concerned the admissibility and competency of the fruits of that search.

The ends of justice could have well been served by means of the procurement of a legal warrant for the petitioner's arrest had not the zeal for an "on the spot pinch" moved the arresting officer and Government agent Deneen to precipitate, though absolutely illegal action.

It might conceivably be argued by the Government that the rule as laid down in the case of *Amos v. United States supra* should not apply in the instant case on the theory that no "seasonable" effort was made to suppress the evidence in question.

Refuting this argument, we would direct the Court's attention to the fact that no examination was held prior to the trial of the herein cause and that the information on which petitioner was tried was not filed in its final amended form until March 1, 1946, the day upon which he actually went to trial. Immediately following the introduction of all of the Government's testimony, with regard

to the arrest and search, a motion to suppress was made by defense counsel and denied by the Court (R. 64).

Because the evidence sought to be suppressed in the instant case consists of the testimony of the persons present at the arrest of the defendant and not, as in the usual case, of exhibits, we call the Court's attention to the Federal rule that the general rule excluding evidence obtained as a result of illegal search and seizure includes oral testimony of facts gathered during an unlawful search and seizure. See *U. S. v. McCumm,* 38 Fed. (2) 246; *Emite v. U. S.,* 15 Fed (2) 623.

Conclusion

The arrest of the petitioner on June 15, 1945 was illegal in that it was made without warrant for a misdemeanor not committed in the presence of the arresting officer, nor for one involving a breach of the peace and it amounted to a denial of rights secured to petitioner by the 4th amendment to the Constitution of the United States and the refusal of the trial court to suppress the evidence obtained by reason of said alleged illegal arrest and the judgment of the Sixth Circuit Court of Appeals in affirming the judgment of the trial court amounted to a denial of rights secured to petitioner by the 5th amendment to the constiuion of he United States.

Respectfully submitted,

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APPENDIX A

Sub-paragraphs B, C and E of Section 1394.8177 of Ration Order 5-C as amended, issued by the Administrator of the Office of Price Administration

Sub-paragraph B:

* * * * *

"No person shall transfer or assign and no person shall accept a transfer or assignment of any gasoline deposit certificate, ration check, folder, or any coupon book, inventory or other coupon, (whether or not such book was issued as a ration book and whether or not such coupon was issued as a ration or part of a ration book), or other evidence, except in accordance with provisions of this order."

Sub-paragraph C:

"No person shall have in his possession any gasoline deposit certificate, ration check, folder, or any coupon book, inventory or other coupon (whether or not such book was issued as a ration book and whether or not such coupon was issued as a ration or as part of a ration book), or other evidence or any identifying folder, except the person or the agent of the person to whom such book, coupon, certificate, check, or folder was issued or by whom it was acquired in accordance with the provisions of this order."

Sub-paragraph E:

"No person shall have in his possession any serially numbered ration coupon without an appropriate folder identifying such coupon, except a dealer or distributor who has lawfully acquired such coupon in exchange for a transfer of gasoline."

* * * * *

APPENDIX B

The Applicable Provisions of Title III of the Second War Powers Act (Act of June 28, 1940, c. 440, 54 Stat. 676)

"Sec. 1. * * *."

"Sec. 2 (a) (1) * * * (2) C * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense. (3) * * * (4) * * * (5) Any person who willfully performs any act prohibited, or wilfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both."

APPENDIX C

The Trial Court's Charge to the Jury (Rec. pages 108-116)

Members of the Jury, the charge in the information against the defendant at bar is that on the fifteenth day of June, 1945, he had in his possession illegally gas coupons. Now, that is the gist and the substance of the charge.

The assumption of our law is that a person charged with a crime is innocent. The fact that he be charged with the commission of a crime cannot be the basis of any inference of his guilt. The law presumes that a person so charged is innocent until the Government convinces you of his guilt beyond a reasonable doubt, and because of this presumption of innocence, one charged with a crime is not compelled to prove his innocence; and growing out of that same theory of our law, one charged with a crime is not compelled to testify. He may or he may not testify; it is wholly within his own volition, and the fact that he doesn't testify cannot be a basis in your minds of any unfavorable inferences, particularly inferences of guilt.

Now, all of the essential facts charged in the case, which must be established by the Government, must be established beyond a reasonable doubt. I will define that to you, and that is the rule that you must apply to the evidence you have heard.

A reasonable doubt is a common-sense doubt, it is not a far-fetched doubt, an extreme doubt, or possible doubt, but it is such a doubt that after your mature and conscientious examination of the evidence, you are not certain to a moral certainty that the defendant is guilty of the charge made against him.

Now, to the essential testimony that surrounds the alleged commission of the crime, you will apply that question of a reasonable doubt, and if the essentials are not established in your minds beyond a reasonable doubt, then the defendant is entitled to a verdict of not guilty at your hands. On the contrary, if the crime charged in the indict-

ment is brought to your minds with a conviction beyond a reasonable doubt, then it will be your duty to bring in a verdict of guilty as charged.

You are the sole judges of the issues of fact and of the credibility of witnesses. You alone can say where the truth lies between diverging statements, contrary statements. You alone can say where the truth lies, even if there be not a conflict definitely established. I mean by that, that you need not even necessarily believe statements that stand uncontradicted on the record, because you will put to each witness the test of credibility, and you may or may not believe that witness, as your good judgment and your conscience and your observation justifies. To each witness who has testified, in reaching your conclusion as to the belief or disbelief that you render that witness, you will use your good judgment and your faculties of observation.

Consider whether that witness may have had some interest in the outcome of the case that would influence the testimony given by the witness beyond the limits of truth, whether it might tend to make one exaggerate, minimize or color, or in fact lie, and if you believe that any witness in this case has told a deliberate falsehood upon any material fact, you are at liberty, not alone to disregard the thing that you believe to be untrue, but in your judgment, if you so elect, you may disregard the entire testimony of that particular witness.

Further, in considering the credibility of witnesses, you may consider their manner upon the stand; whether they impress you as endeavoring to tell an honest and unexaggerated story; whether they seem to be endeavoring to the best of their ability to give you the naked truth, uncolored, unminimized, and unexaggerated. Bring to that test your ordinary faculties of observation, just as you would observe closely any person that is giving to you some important communication. Watch his manner, watch his eyes, watch the physical exhibition that he may make in the statement while he is giving the statement. All these things, based upon your sound judgment, are indicative of whether that witness is telling the truth or not. So where

there be issues of fact, you are the sole judges, as you are the absolute and final source of the credibility of all witnesses.

Now, as I said, the gist of this case is the charge that the defendant, on the day indicated, had in his possession illegal gasoline stamps. It is the obligation of the government to establish that in your minds beyond a reasonable doubt.

Now, in the first instance, it has narrowed down to a very small section of testimony, and a very small period in elapsation of time. This crime charged means that it was committed in the presence of the arresting officers. It is in law what we call a misdemeanor, and the law is that there may not be an arrest for a misdemeanor unless that misdemeanor was committed before and in the presence of the arresting officer. The officer must by the use of his faculties, his senses, have observed, sufficiently and convincingly that there probably was an offense being committed before him.

Now, in this case, when I say the officer must see, or by the use of his faculties, probably the better word is "senses," I would mean that by his observation, visual observation, and his hearing, before the arrest, and if the officer was justified, and you shall decide that, by what he saw and heard, and a probable belief there was being committed before him this offense, then he would have been justified in arresting the defendant, and whatever developed from that arrest in the way of search, and whatever developed through that search, would then be legitimately before you; but, if you found that the officer was not justified in making the arrest, in other words, that there was not an offense being committed in his presence, then there could be no justification for a verdict of guilty, no matter what developed from the subsequent observation, search or statement, and so that is the gist of the crime charged.

When you come down to it, in its ultimate analysis—you see, it all occurred in a short time and in a small place, and that is the vital thing: What occurred then? So, you will

view that from the basis that I have given to you, considering all the surrounding circumstances, the observation, the positions, and all observations made, the distances indicated, so that you may come to a judgment as to whether or not the crime alleged was committed in the presence of the officer, thus justifying his arrest of the defendant.

What I have said as to the law, you may not contend among yourselves as to whether it is good law or not, whether it is law or not. When I had enunciated, so far as you are concerned, it is the law. No matter whether I am wrong, or ignorant of it, and you know that, you follow what I say, because, as I have often told you, if I make a mistake in my understanding of the law, there are higher courts that can correct it. So, your part is more important than mine. If you decide the case on some basis other than the evidence that you have heard from the stand, with its logical and reasonable inferences, and the exhibits that have been given to you for your examination, if you decide from some other outside sources, prejudice, malice, or preconceived ideas, then that decision is made in the chambers of your mind, and undisclosed, and therefore there can be no correction to the error that you make.

So, take this case, stripped of any outside influences, anything that you may have read or heard, any prejudice growing out of any phase of life of any character whatsoever, and decide it, your decision being based on what you have heard from this witness-stand, the exhibits, and the inferences from the oral word, and the written word, guided by the law as I have given it to you, controlling the central points in the case. If your make your decisions, as you must, under the obligation of your oaths, on such a basis, unmoved by any prejudice or any extraneous thing, then it will be a fair verdict and a just verdict.

Have you any suggestions, gentlemen? If so, I will excuse the Jury while you discuss them.

Mr. Fitzpatrick: Just one, your Honor please.
The Court: The jury may be excused.
(Whereupon the Jurors leave the courtroom.)

Mr. Fitzpatrick: Your Honor please, I am not so sure there is not much difference, but I believe your Honor stated that the gist of the offense was the possession of illegal gas coupons, and I thought that the actual charge is illegal possession of gasoline ration coupons, and only for the purpose of having the record straight, I thought your Honor might want to change it. I call your Honor's attention to the difference—

The Court: It is not the contention that they were illegal coupons?

Mr. Fitzpatrick: I think very clearly that is true, but the charge is illegal possession.

The Court: I will tell them; because it is such a narrow distinction, they may be confused. Do you wish me to do that?

Mr. Fitzpatrick: That is what the charge is here, it is "illegal possession," not the possession of illegal coupons. Now, your Honor please, may I call your Honor's attention to defendant's Request No. 2?

The Court: Yes.

Mr. Fitpatrick: I believe that under the situation as it stands here now, that the defendant is entitled to that charge or to the equivalent of it. I think you have covered the portion of the request that is contained in the last portion of it, but not in the first, sir.

The Court: That in effect it is of no importance what he intended to do with those coupons, whether to put them to an unlawful use or not? Well, of course, that is true, but when I told them that the only crime that is charged is illegal possession, I can go further and tell them the other thing, too. I told them what the crime is, and I don't think it is going to be enlightening to tell them what the crime is not.

Mr. Fitzpatrick: Except, because there is evidence, as I claim, improperly before them—

The Court: All right, if you want me to tell the Jury that it is of no effect what his intent may have been in the distribution of the coupons, if it were illegal or not, it doesn't make any difference.

Mr. Fitzpatrick: Yes. And, may I call your attention to Request No. 5, sir?

The Court: All right.

Mr. Fitzpatrick: The defendandant's Request No. 5 is a request for a charge to the substantial effect that if there is any reasonable theory of innocence, that innocence of the defendant which has not been disproved, they must find him not guilty. That may or may not, at your Honor's discretion be charged as to reasonable doubt—

The Court: All right.

Mr. Fitzpatrick: Thank you, sir.

Mr. Norris: May I say a word?

The Court: Yes, Mr. Norris.

Mr. Norris: As to Defendant's Request No. 5 taking the last first, your Honor please, I certainly do not believe that the defendant is entitled to any charge, certainly not the language that appears there. I think the Court has adequately covered that request in his general instructions to the Jury as to the burden of proof being upon the Government to establish defendant's guilt beyond a reasonable doubt, and your Honor's definition of what constitutes a reasonable doubt. This charge, as set forth in here, it is not the law that a Jury must conjure up in their minds and speculate as to the best theories of innocence. They are bound by the evidence in this case or the lack of evidence, and that is all, your Honor, please.

The Court: You mean, that Mr. Fitzpatrick has suggested?

Mr. Norris: Yes.

The Court: That is the one as to illegal possession, rather than possession of illegal coupons?

Mr. Norris: Yes. In that connection, your Honor please, I would respectfully request your Honor, if it is referred to again—I was going to request it, but I was going to pass it if your Honor was not bringing back the Jury; but if your Honor does bring back the Jury, I would like your Honor to read the pertinent sections of the Regulation, the subject of the charge in this information. I have marked them with blue pencil. I am handing at this time, your Honor please, a printed copy of the ration order 5-C made effective May first, 1945. I think, for the purpose of clarity, your Honor should read this section charged in this information.

The Court: I have the sections you refer to?

Mr. Fitzpatrick: Subdivisions "C" and "E" was that not?

Mr. Norris: Yes, "B," "C" and "E," your Honor please.

The Court: You may call the Jury back.

Mr. Fitzpatrick: May I suggest one thing: we never even had the benefit of that Regulation, and I don't think the Regulation should be read to them. That must necessarily confuse them; it confuses me, after two years of living with it.

The Court: I think I will read it; it gives it in detail.

Mr. Fitzpatrick: Isn't the language of the information conclusive on that point?

The Court: It is conclusive, but not comprehensive.

(Whereupon the Jurors returned to the jury box.)

The Court: It is thought that I may have inverted the language of the charge in saying that it was the possession of illegal coupons, rather than illegal possession of coupons. If so, that is the charge, illegal possession, and in order that you may know just what the law is in connection with that, I am going to read it to you now in detail, so here are the effective paragraphs that are the substance of the charge in the case before you:

> "No person shall transfer or assign, and no person shall accept a transfer or assignment of any gasoline deposit certificate, ration check folder, or any coupon book, inventory or other coupon, whether or not such book was issued as a ration book or whether such coupon was issued as a ration or as a part of a ration, or other evidence except in accordance with the provision in this order. No person shall have in his possession any gasoline deposit certificate, ration check folder, or any gasoline deposit certificate, ration check folder, or any coupon book, inventory, or other coupon, whether or not such book was issued as a ration book or whether or not such book was issued as a ration, or as a part of a ration, or other evidence or identifying folder, except the person or the agent of the person to whom such book, certificate, coupon,

check or folder was issued, or by whom it was acquired in accordance with the provisions of this order. No person shall have in his possession any serially numbered ration coupon without an appropriate folder identifying such coupon, except a dealer or a distributor who has lawfully acquired such coupon in exchange for the transfer of gasoline."

I have told you the gist of the crime is the illegal possession, so you are not to concern yourselves in any degree with what this defendant may or may not have intended to do with those coupons, whether he may have intended to put them to an illegal use or not does not concern you, but solely the question of the illegal possession.

Every essential fact that must be established by the Government must be established in your minds beyond a reasonable doubt. If you have a reasonable doubt, then the Government has not sustained its obligation. If you believe that from the testimony that the defendant is innocent, then it has not sustained the burden the law puts upon it of convincing you beyond a reasonable doubt of the guilt of the defendant.

I think that is all. If you want any of the exhibits that were introduced in evidence, and exhibited, you may have them. Was there something further you wanted to say?

Mr. Norris: I think inasmuch as your Honor has referred to reasonable doubt again, and repeated what burden of proof the Government has, I think, in order that—

The Court: If you are going to make a suggestion, we will have the Jury go out.

Mr. Norris: No, I just wanted your Honor to charge them again as to what constituted a reasonable doubt in view of the fact your Honor has referred to the burden of proof again. I think they go together.

The Court: All right. A reasonable doubt is a commonsense doubt, a doubt that must be founded and growing out of the testimony you have heard from the stand. It is a reasonable conclusion. It is not a possible doubt. For instance, you may not say, Is it possible that the defendant be not guilty? That is not a reasonable doubt. It is

a fair doubt, a sound doubt. It is indicated by the name itself, a doubt that is backed by reason, a doubt for which you could give a sensible reason. It is such a doubt that after you have considered all the testimony you are not sure to a moral certainty that the defendant is guilty of the charge against him. Does that satisfy you not?

Mr. Norris: Yes.

Mr. Fitzpatrick: Yes.

The Court: All right, the Jury will retire. If the Jury should bring in a verdict in the absence of counsel, may the Court take the verdict?

Mr. Fitzpatrick: Yes.

Mr. Norris: Yes.

The Court: Swear the officers.

(The officers sworn.)

(The Jury retired to the jury room for deliberations at 10:10 o'clock a. m.)

APPENDIX D

Text of Section 632 of Title 28 U. S. Code (Act of March 16, 1878, c. 37, 20 Stat. 30)

"In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and courts martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him. (Mar. 16, 1878, c. 37, 20 Stat. 30)"

APPENDIX E

Section 347 (a) of Title 28 U. S. Code

"(a) In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after the judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal."

• • •

(Mar. 3, 1891, c. 517 §6, 26 Stat. 828; Mar. 3, 1911, c. 231, §240, 36 Stat. 1157; Feb. 13, 1925, c. 229, §1, 43 Stat. 938; Jan. 31, 1928, c. 14, §1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926.)

INDEX

CITATIONS

757303—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 177

AVERY B. CHERETON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 155–156; see also, R. 150–155) has not yet been reported.

JURISDICTION

The original judgment of the circuit court of appeals was entered April 10, 1947 (R. 149). On consideration of a petition for rehearing (R. 151–154) that judgment was vacated (R. 155), and subsequently on June 5, 1947, a new judgment was entered (R. 155). On June 6, 1947, the petition for rehearing was denied (R. 156). The petition for a writ of certiorari was filed July 5,

1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether, in view of the conclusive evidence of petitioner's guilt and his failure to request such an instruction, his conviction for illegal possession of ration coupons should be reversed because the trial judge failed specifically to instruct the jury as to intent.

2. Whether the closing argument of the United States Attorney prejudicially referred to petitioner's failure to take the stand in his own defense.

3. Whether the trial judge abused his discretion in refusing to declare a mistrial requested by reason of jurors having read a newspaper article concerning petitioner.

4. Whether the trial court should have suppressed certain evidence on the ground that is was obtained as a result of an arrest asserted to have been illegal because the offense, a misdemeanor, was not committed in the presence of the arresting officer.

STATUTE AND REGULATIONS INVOLVED

Section 2 (a) (5) of the Second War Powers Act, 1942 (Act of March 27, 1942, c. 199, 56 Stat. 176, 50 U. S. C. App., Supp. V, § 633 (a) (5)) provides:

> (5) Any person who willfully performs any act prohibited, or willfully fails to per-

form any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

Section 1394.8177 of Ration Order 5–C (effective November 9, 1942, 7 F. R. 9135, 9156) provided, in pertinent part:

> (b) No person shall transfer or assign and no person shall accept a transfer or assignment of any coupon book or any bulb, inventory or other coupon (whether or not such book was issued as a ration book and whether or not such coupon was issued as a ration or as part of a ration book) or other evidence, except in accordance with the provisions of Ration Order No. 5C.
>
> (c) No person shall have in his possession any coupon book or bulk, inventory or other coupon (whether or not such book was issued as a ration book and whether or not such coupon was issued as a ration or as part of a ration book) or other evidence, except the person, or the agent of the person, to whom such book, coupon, or certificate was issued or by whom it was acquired in accordance with the provisions of Ration Order No. 5C.

STATEMENT

On March 1, 1946, an information was filed in the District Court for the Eastern District of

Michigan, charging that on June 15, 1945, petitioner "did unlawfully, wilfully and knowingly have in his possession certain ration coupons, to-wit: 148 gasoline ration coupons; 13 C–6 gasoline ration coupons, 74 C–7 gasoline ration coupons, and 61 T second-quarter, 1945 gasoline ration coupons, which had not been issued to him under any of the provisions of Rev. Ration Order No. 5–C, as amended," in violation of the Second War Powers Act, 1942, and Ration Order 5–C promulgated thereunder (R. 1–2). After a jury trial, petitioner was found guilty (R. 4) and sentenced to imprisonment for one year and to pay a fine of $1,000 (R. 5). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the conviction was affirmed (R. 155).

The evidence in support of the conviction may be briefly summarized as follows:

About 7:00 p. m., June 14, 1945, petitioner bought gasoline at a station operated by one Joseph John George in Detroit and surrendered to George coupons representing 80 gallons of gasoline, requesting George to give him credit for the unused balance (R. 13–14). George turned the coupons over and noticed that they had been steamed off a sheet. Petitioner told him that "he just come from Chicago and brought them stamps." He also told George that he wanted "1000 gallons a week for his cruiser, and the Government only give him 27 gallons, and he cannot operate it." George advised petitioner that

he could not do anything but that he would call the company and see what they could do for petitioner. It was agreed that petitioner would return for an answer at 10:00 a. m. the next day. (R. 14.) When petitioner left the station, George contacted a local O. P. A. enforcement official, advised him of the incident, and surrendered the coupons petitioner had given him (R. 14–15, 28). The license numbers endorsed on the coupons were not the same as those on petitioner's automobile (R. 15).[1]

As a result of George's report, arrangements were made for an O. P. A. investigator and a city detective to be present when petitioner returned to George's station (R. 15). When petitioner arrived at the station, between 10 and 11 a. m. on June 15, George introduced the O. P. A. in-

[1] Section 1394.8004 of Ration Order 5–C provided in part as follows (7 F. R. 9148):

"(d) Each person to whom a ration book has heretofore been or is hereafter issued shall clearly write in ink (or in the case of interchangeable coupon books issued for official or fleet vehicles, shall clearly write in ink or stamp in ink) on the reverse side of each coupon issued to him, before accepting a transfer of gasoline in exchange for such coupon, the following information:

"(1) In the case of A, B, C, D, T–1 or T–2 books; license number and state of registration of the vehicle for which such ration was issued, except that in the case of interchangeable coupon books issued for official or fleet vehicles the information shall be the official or fleet designation (or the Certificate of War Necessity number in the case of commercial vehicles not bearing fleet designations) and the state and city or town in which the principal office of the fleet operator is located."

vestigator to him as the gasoline company man (R. 15, 16, 54). Petitioner said he wanted to get some gasoline for his yacht (R. 16, 48), and when the investigator asked what kind of coupons he had, petitioner pulled out an envelope full of loose[3] coupons from which the investigator took two coupons which both he and George observed were "steamers" or used coupons which had been torn from gummed sheets (R. 16, 43–44).[4] At that point the city detective came out of the ladies rest room from which he had observed the foregoing occurrences by means of reflections from a wall mirror of the rest room the door of which was open about one foot (R. 54). The detective took the envelope out of petitioner's hand and

[3] Section 1394.8153 of Ration Order 5–C provided in pertinent part (7 F. R. 9153):

"Transfer may be made and accepted in exchange for coupons contained in Class A, B, C, D, T–1, or T–2 books, only under the following conditions:

"(1) At the time of transfer, the transferor must require presentation of the coupon book and must detach therefrom coupons having an aggregate unit value equal to the amount of gasoline transferred: *Provided*, That if the transferee is able to accept only a portion of the amount of gasoline represented by the unit value of a coupon, the transferor shall nevertheless detach an entire coupon. No transfer may be made pursuant to this paragraph in exchange for a coupon detached prior to the presentation of the coupon book to the transferor."

[4] An O. P. A. official testified that "steamers" were coupons which had already been surrendered for gasoline and thus had fulfilled their legal function and which were thereafter steamed or torn from official gummed sheets to which they had been attached by the seller for surrender to and destruction by O. P. A. (R. 28–30).

placed him under arrest (R. 54, 16, 27). Subsequently, the contents of the envelope were carefully examined and were disclosed to include 87 C and 61 T[4] gasoline coupons, all of which were originally issued for the Chicago area, bore Illinois license numbers and were "steamers" (R. 55, 56, 58–59, 34).

The coupons were not introduced in evidence because after they had been checked and laid aside in the O. P. A. offices awaiting petitioner's trial, they disappeared (R. 39). However, the fact that they were "steamers" or used coupons was fully confirmed, as described above, by the testimony of the O. P. A. officials, the detective, and George. Moreover, the O. P. A. investigator testified that such coupons would not have been issued to petitioner or his company in the form in which he found them and that their condition indicated they were stolen. (R. 53.) Additionally, the detective testified that after he had arrested petitioner and advised him that he "was a police officer, as he already knew, and that he did not have to talk to me, but what he did tell me I could testify to in court" (R. 55), petitioner told him (R. 58–59),

> he was the owner of a cruiser. He gave me the name of the cruiser, but I do not re-

[4] "C" coupons were issued as supplemental rations for private automobiles, T coupons (transport rations) for commercial vehicles. See § 1394.7701 (a) and § 1394.7801 of Ration Order 5–C at 7 F. R. 9140, 9145.

member it. I think he told me it had two motors, 250 horsepower each motor, and that it consumed quite an amount of gasoline. He said that he had passed out word around where his boat was stored, that he wanted somebody to captain the boat, and a man had come into his office, and represented himself as a qualified person to captain this boat, and asked him if he had the position open.

Mr Chereton said he had told this man that due to the gas situation he had changed his mind. The man then pulled this envelope of stamps out, and threw it on top of his desk, and told him that if stamps was all that was bothering him he could do what everybody else did that was owning a boat, stamps could be gotten easy. And he left these stamps—he left this envelope of stamps in Mr. Chereton's possession for Mr. Chereton to verify as to whether or not they were counterfeits or not, or if they could be used. And he was to return within the next day or two or three days. I don't exactly remember when, and collect a sum of money, I believe to be $35.00, for the contents of that envelope, and the job, if Mr. Chereton saw fit to hire him, with the understanding he could also procure more stamps as needed.

Mr. Deneen and myself then took Mr. Chereton to Mr. Lindbloom's office, where I initialled all of the stamps. Every one of the stamps was a steamer. I have had some experience with the police department

during gasoline rationing, and have seen similar coupons that have been used once, and then put back in traffic again.

The license numbers on these various coupons were all Illinois license numbers.

ARGUMENT

1. Notwithstanding that he concurred in the trial judge's instructions to the jury when they were given, petitioner now urges as a basis for reversal (Pet. 17–24) that they erroneously failed to include an instruction on wilfulness, which is an element of the offense defined by Section 2 (a) (5) of the Second War Powers Act (*supra*, pp. 2–3).

Consistently with Section 2 (a) (5) of the Second War Powers Act, the information charged petitioner with having "unlawfully, wilfully and knowingly" possessed described coupons in violation of Revised Ration Order No. 5–C, as amended (see Section 1394.8177, *supra*, p. 3). The evidence summarized in the Statement, *supra*, pp. 4–9, demonstrates quite conclusively, we think, that petitioner wilfully committed the offense charged in the information. In charging the jury, however, the trial judge unfortunately did not specifically refer to the element of wilfulness, and it is in this respect that petitioner now belatedly complains.

In instructing the jury, the trial judge stated (R. 108):

> Members of the Jury, the charge in the information against the defendant at bar is that on the fifteenth day of June, 1945,

> he had in his possession illegally gas coupons. Now, that is the gist and the substance of the charge.

The court then instructed concerning the presumption of innocence; the privilege of petitioner not to take the stand; the Government's burden to prove its case beyond a reasonable doubt; the jury's function as the trier of fact; and the court suggested guides in measuring credibility (R. 108–110). At this juncture, the court referred to the charge again, as follows (R. 110):

> Now, as I said, the gist of this case is the charge that the defendant, on the day indicated, had in his possession illegal gasoline stamps. It is the obligation of the government to establish that in your minds beyond a reasonable doubt.

Other instructions not material here were given (R. 110–112), and the court then inquired of counsel (R. 112):

> Have you any suggestions, gentlemen? If so, I will excuse the Jury while you discuss them.

Petitioner's counsel suggested "Just one," which is not here pertinent. Petitioner's counsel then suggested an additional instruction incorporating his requested instructions numbers 2 and 5, which emphasized that petitioner's purpose in possessing the coupons was not to be considered by the jury and that the Government was required to "disprove every reasonable theory consistent with the

innocence of the defendant" (R. 107). The Assistant United States Attorney suggested that the section of the regulation which petitioner was charged with violating should also be read to the jury. (R. 112–114.) The court then further instructed the jury in the manner requested by both counsel (R. 114–116), and after both attorneys assured the court that they were satisfied with the instructions (R. 116), the jury was allowed to retire.

While there can be no doubt that it would have been desirable for the trial judge specifically to have instructed the jury that wilfulness was an element of the offense charged in the information, the question here is whether, having affirmatively acquiesced in the charge which the court gave and not having requested an instruction on the subject, petitioner may now urge that he should have a new trial in which such an instruction will be given. Rule 30 of the Federal Rules of Criminal Procedure demonstrates, we submit, that petitioner is not now entitled to challenge the court's instructions. The rule provides:

> RULE 30. *Instructions.*—At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel

> of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Petitioner availed himself of the opportunity conferred by the rule to file written requests to charge, but he did not request the instruction he now urges should have been given. Petitioner affirmatively acquiesced in the court's charge; he did not object thereto before the jury retired to consider its verdict, stating distinctly the matter to which he objected and the grounds of his objection. In the circumstances, he has no right, under the rule, to object to the charge on the ground which he now urges. Particularly in view of the anxiety of the trial judge to instruct the jury in a manner satisfactory to petitioner, we think it is not unreasonable to insist that petitioner may not now complain of that which he earlier approved. *Johnson* v. *United States,* 318 U. S. 189, 199–201.

We are mindful of the fact that Rule 52 (b) empowers an appellate court to notice "Plain errors or defects affecting substantial rights" although "they were not brought to the attention

of the court." But this is not a case in which the error "seriously affects the fairness, integrity or public reputation of judicial proceedings," *Johnson* v. *United States, supra,* at p. 200. Indeed, if the jury believed the Government's witnesses—and its verdict shows that it did—it could have reached no conclusion other than that petitioner intentionally and purposefully possessed illicit gasoline ration coupons in an effort to obtain more than his share of rationed gasoline. The evidence showed that the coupons were obviously "steamers," that they bore license numbers other than petitioner's, that they were carried loose in an envelope rather than being attached to ration books as required, and that petitioner admitted that he had obtained them by devious means for the purpose of obtaining gasoline for his yacht. Such evidence shows not only that petitioner wittingly and intentionally possessed the illicit coupons, which is all that the statute requires,[5] but also that his motive was evil. The case is not one, we submit, where intervention by this Court is essential in the interests of justice.

2. In his closing argument, the prosecutor made the following remarks (R. 137–138):

> I will ask you members of the Jury to take this case from the evidence you have

[5] *Kempe* v. *United States*, 151 F. 2d 680, 688 (C. C. A. 8); *Zimberg* v. *United States*, 142 F. 2d 132, 137 (C. C. A. 1), certiorari denied, 323 U. S. 712; *Gomila* v. *United States*, 159 F. 2d 1006, 1009 (C. C. A. 6), certiorari denied June 2, 1947.

> heard from the witness-stand, and that is all. We are satisfied, the Government is satisfied to submit this case to you under the evidence that you heard from the mouths of the Government witnesses.
>
> I have told you before, members of the Jury, and it bears repeating, how is their testimony controverted? These witnesses for the defendant, do they tell you one thing, does any witness for the defendant in this case tell you that one of these 148 coupons was lawfully in the possession of Mr. Chereton? No, no. They tell you, and put people on the stand here, that because of the fact they were getting coupons from the ODT, and there was this business of shuffling them around in Chicago, and sending them through the mail, you are supposed to infer from that, that maybe those were legal, and has anyone the temerity to get on the stand and tell you a very simple statement a very simple statement to the effect these 148 coupons are legal, and Mr. Chereton had a right to them.

Petitioner, though he did not at the time they were made object to the foregoing remarks on such a ground (see R. 138), now asserts that they improperly reflected on his failure to take the stand in his own defense (Pet. 25–29). However, in the context of the entire trial, it is apparent that no such reflection was intended or could fairly be inferred. Petitioner's defense consisted of an attempt to explain his possession

of the ration coupons through the testimony of certain employees of the company of which he was president (see R. 87–106). The assertedly objectionable remarks, when read together with the other portions of the prosecutor's closing argument referring to that defense testimony, obviously were solely and properly directed to the failure of these defense witnesses to explain in what way petitioner's possession of the "steamers" was legal. In any event, any possible prejudice that might otherwise have ensued from a misconstruction of the remarks such as advanced by petitioner was obviated by the trial judge's admonitory charge to the jury that they were to draw no unfavorable inference from the fact that petitioner did not take the stand (R. 108).

3. Petitioner next contends that the trial judge should have granted his motion for a mistrial when advised that a juror or jurors had, during the course of the trial, read a certain newspaper article reciting details of the trial and referring to a prior federal conviction of petitioner (Pet. 30–33).

When the situation was called to the trial judge's attention, he carefully probed the jury to determine what effect the article might have had upon them. The one or two jurors who read the article only vaguely recalled its contents. Moreover, they flatly assured the court that it

would not affect their judgment in the case. (R. 80–81.) Thereupon the trial judge stated (R. 82):

> The COURT. All right. I think the motion will be denied. This jury isn't a new, inexperienced jury; they have been here since last November, and they have been instructed innumerable times of their absolute duty, in deciding cases from the evidence in court, and nothing else.
>
> Counsel for the Government, counsel for the defendant, or the court itself, of course, has no control over what a newspaper may print; but the only thing we are interested in is that if that newspaper does print something concerning the case pending before any particular jury, is whether that jury has been affected detrimentally to the interests of the people in the case, to any degree. If it should happen that it was, of course, the duty of the court would be to dismiss you from further consideration of the case; but, as you have assured me that nothing you have read in any paper would in any way affect your ultimate judgment in this case, the motion will be denied. Proceed with the testimony.

We submit that the trial judge's determination was proper under the circumstances. The opportunity for prejudice by reason of the newspaper article raised no presumption that it existed. *Holt* v. *United States,* 218 U. S. 245, 251. And the trial judge was best able to determine, as he as-

siduously attempted to do, whether any prejudice did in fact result. Certainly, the fact that jurors have read an article commenting on a case or defendant before them should not be foundation, *ipso facto,* for their discharge, for the jury system, particularly in large metropolitan centers, cannot be administered so as to isolate jurors from all worldly contact and normal news sources during the many weeks or months in which they may be required to serve. *Holt* v. *United States, supra;* cf. *United States* v. *Keegan,* 141 F. 2d 248, 258 (C. C. A. 2), reversed on another ground, 325 U. S. 478. Accordingly, where, as here, the trial justice assured himself that no prejudicial impression had remained with the jurors as a result of reading the newspaper article in question, no abuse of discretion is shown in his refusal to declare a mistrial. *United States* v. *Carruthers,* 152 F. 2d 512, 519 (C. C. A. 7), certiorari denied, 327 U. S. 787.

4. Petitioner's last contention is that evidence adduced as a result of his arrest should have been suppressed at his trial because the offense in question, a misdemeanor, was not committed in the presence of the arresting officer (Pet. 33–37). This contention would appear foreclosed by the jury's verdict returned after unequivocal instructions to them that "* * * if you found that the officer was not justified in making the arrest, in other words, that there was not an offense being

committed in his presence, then there could be no justification for a verdict of guilty, no matter what developed from the subsequent observation, search or statement * * *" (R. 111). Moreover, petitioner made no protest at the time the ration coupons were taken. Cf. *MacDaniel* v. *United States,* 294 Fed. 769, 773 (C. C. A. 6), certiorari denied, 264 U. S. 593; *Cardenti* v. *United States,* 24 F. 2d 782, 783 (C. C. A. 9); *Harkline* v. *United States,* 4 F. 2d 526, 527 (C. C. A. 8); *Patterson* v. *United States,* 31 F. 2d 737, 738 (C. C. A. 9).

In any event, petitioner's contention is without basis. His argument is bottomed on the assertion that when the city detective stepped out of his place of concealment, seized the envelope in which the ration coupons were contained, and arrested petitioner, the ration coupons were not visible to him. However, the officer testified that while petitioner and the O. P. A. investigator were talking, he "saw Mr. Chereton reach in his pocket and pull out this envelope. *I could see the stamps there,* and I reached over his shoulder and took them out of his hand." (R. 60.) [Italics supplied.] The ration coupons were, of course, the property of the United States, and its reclamation of that property, unlawfully in petitioner's possession, was not subject to the normal restraints against intrusion on one's privacy. *Davis* v. *United States,* 328 U. S. 582, 593. Moreover, the previous information and observations of the ar-

resting officer gave him full sensory perception if not ocular evidence of petitioner's possession of the coupons. Cf., e. g., *Davis* v. *United States, supra,* at 592; *Garske* v. *United States,* 1 F. 2d 620, 622, 623 (C. C. A. 8); *Scher* v. *United States,* 95 F. 2d 64, 65 (C. C. A. 6, affirmed, 305 U. S. 251). Accordingly, it is clear that the offense, illegal possession of ration coupons, was committed in the arresting officer's presence and that, therefore, the arrest was lawful and evidence obtained as a result thereof not subject to suppression.

CONCLUSION

The judgment below is clearly correct, and there is no occasion for review by this Court. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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AUGUST 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947